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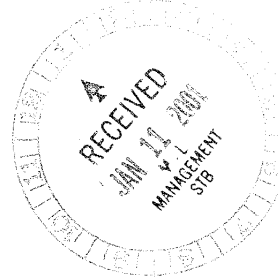
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January 11, 2001

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BY HAND DELIVERY

The Honorable Vernon A. Williams  
Secretary, Surface Transportation Board  
Case Control Branch  
1925 K Street, N.W.  
Washington, DC 20423-0001



Re: STB Ex Parte No. 582 (Sub-No. 1), Major Rail  
Consolidation Procedures

Dear Secretary Williams:

Enclosed for filing in the above-referenced docket are an original and twenty-five copies of the Rebuttal Comments of the Committee To Improve American Coal Transportation. Also enclosed is a 3.5-inch diskette, formatted for WordPerfect 5.x, containing the pleading.

Thank you for your assistance.

Very truly yours,

Eric Von Salzen  
Attorney for the Committee To  
Improve American Coal Transportation

MIT/mpr

Enclosures

cc: All Parties of Record To Be Served

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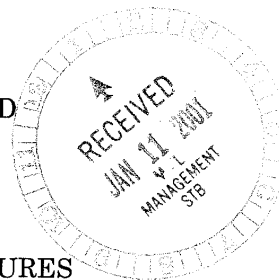
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BEFORE THE  
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES



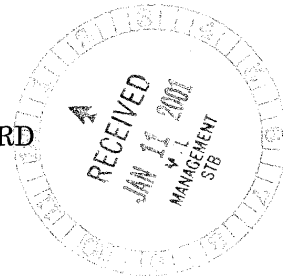
**REBUTTAL  
COMMENTS OF  
THE COMMITTEE TO IMPROVE  
AMERICAN COAL TRANSPORTATION**

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American Coal Transportation

January 11, 2001

BEFORE THE  
SURFACE TRANSPORTATION BOARD



STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

REBUTTAL  
COMMENTS OF  
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AMERICAN COAL TRANSPORTATION

The Board's Proposed Rules seek to establish a new paradigm for dealing with Class I railroad mergers in the early 21st century. The challenge is great, because the mergers of the past decade have left the railroad industry without adequate intramodal competition, yet the big railroads seem under a compulsion to eliminate what competition remains by continuing to merge with each other. IMPACT's 1/ opening Comments offered a number of proposals intended to make the Board's Proposed Rules more effective in dealing with this challenge.

The big railroads do not like the objectives of the Proposed Rules, and they most particularly do not like proposals that might make the rules more effective. Several big railroads have attacked IMPACT's proposals, and we respond briefly to these attacks in the following discussion.

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1/ IMPACT, the Committee to Improve American Coal Transportation, is an ad hoc group of energy companies that operate coal-fired electricity generation assets. The members of IMPACT are listed in Appendix A to IMPACT's November 17th Comments.

## DISCUSSION

### **A. THE BOARD SHOULD REQUIRE A “COOLING OFF” PERIOD BETWEEN MAJOR RAIL MERGERS**

In its opening Comments, IMPACT reiterated the proposal that it advanced in its May 16, 2000 Comments on the Board’s Advance Notice of Rulemaking 2/ for a 36-month pause between the implementation of one merger among Class I railroads and the filing of the next such merger. IMPACT’s opening Comments at 18-21. The purpose of such a pause would be to enhance the Board’s ability to evaluate the downstream effects of a proposed merger, particularly the effect of one merger to trigger responsive mergers.

Several of the big railroads objected to this proposal in their Reply Comments, on the ground that it would interfere with their freedom to control the timing of mergers undertaken in response to the next Class I merger. 3/ Yet their statements make clear that each one expects that, if it is not part of the first merger filed after the Board’s moratorium expires, it will be a part of the next merger, rather than risk being “left behind”. 4/ Thus, these railroads confirm the conclusion that each merger among Class I railroads will have the “downstream” effect of

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2/ IMPACT May 16, 2000 Comments at 16-17, 40. The proposal for a pause between major rail mergers was first made by Edison Mission Energy Co. and Midwest Generation LLC (members of IMPACT) in their February 28, 2000 Statement in Ex Parte No. 582 (at pp. 13-14).

3/ BNSF Reply Comments at 13; CN Reply Comments at 7-8; CP Reply Comments at 4-5.

4/ Id.

triggering other mergers among Class I railroads, leading quickly to the “end game”.

In this “end game” situation, the Board obviously must abandon its “one case at a time” approach, and to consider the “downstream” effects of each Class I merger, as the Notice of Rulemaking Proposes. The cooling off period between mergers would facilitate the Board’s ability to do this, by encouraging the big railroads to combine several mergers into a single proceeding, in which all effects could be considered at once. See IMPACT Reply Comments at 35-37. The Board should adopt this reasonable measure to enhance its ability to deal with the merger end game. 5/

**B. THE GOAL OF THE BOARD’S MERGER POLICIES SHOULD BE TO ESTABLISH ADEQUATE INTRAMODAL COMPETITION IN MAJOR MARKETS TO THE EXTENT POSSIBLE**

In its opening Comments, IMPACT pointed out that, as a result of Class I rail mergers approved by the ICC and Board during the last decade, there is inadequate intramodal competition in the Class I railroad industry today. IMPACT therefore applauded the Board’s proposal that future merger applicants be required to show that their transactions would not only preserve but enhance competition. IMPACT urged the Board to establish the goal for its merger policy that there be

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5/ BNSF makes a technical objection to IMPACT’s proposal, on the ground that a responsive merger does not fit the definition of a “responsive application” in the Board’s current rules. BNSF Reply Comments at 8 and n. 10. BNSF overlooks the fact that this is a rulemaking proceeding, and if the definition of responsive application needs to be changed to accomplish the stated purpose of the cooling off period, it can be changed.

three competing railroads in major markets to the extent possible. IMPACT opening Comments at 5-10.

The AAR's snide response to these comments was that "[i]t is hard to believe" that IMPACT "expect[s] the Board to take them seriously." AAR characterized the proposals made by IMPACT (and others) as attempts "to restructure the railroad markets for their own perceived short term benefit through new regulation . . . ." AAR Reply Comments at 6. See, also, CSX Reply Comments at 17-21.

It is not IMPACT that has been blindly pursuing perceived short term benefit, but the big railroads, which have tried to use mergers to acquire traffic and squeeze captive customers for greater and greater "contributions". See IMPACT Reply Comments at 27-28. Where this will all lead, if the Board does not apply the brakes to the big railroads' merger mania, is the elimination of the last pretense of intramodal competition and the inevitable return of strict regulation. *Id.* at 25-26.

The issues before the Board in this proceeding are extremely important, and we have no doubt that the Board will "take seriously" the constructive suggestions offered by IMPACT and other parties, notwithstanding the AAR's wish that the Board do otherwise.

**C. DIVESTITURE SHOULD BE THE PREFERRED REMEDY FOR COMPETITIVE PROBLEMS IN MAJOR RAIL MERGERS**

In its opening Comments, IMPACT urged the Board to follow standard antitrust practice and use divestiture as the preferred remedy for competitive problems caused by Class I rail mergers; the weaker remedies the Board has used

in the past, such as trackage and haulage rights, have proved ineffectual. IMPACT opening Comments at 23-25.

UP opposed this suggestion, and touted the “proven remedy of trackage rights.” UP Reply Comments at 16. However, UP’s reasons for opposing the divestiture remedy will not withstand scrutiny. On the one hand, UP argues that future mergers will be predominantly end to end, and divestiture “makes little sense” for end to end mergers. On the other hand, UP argues that divestiture is a bad remedy because it “prevent[s] the merged carrier from eliminating redundant facilities and combining traffic flows.” *Id.* But if the future mergers are truly “end to end”, where do the “redundant facilities” and “combined traffic flows” come from?

The fact is that the entire notion of an “end to end” merger is misleading in the current, highly-concentrated, Class I railroad industry. The claim that railroads which connect end to end do not compete with each other, and that an end-to-end merger therefore cannot be anticompetitive, has no relationship to the reality of the modern railroad industry. In the first place, railroads almost never enjoy wholly end-to-end connections; they almost always have parallel lines in some regions. Even where they have no parallel lines, railroads may compete with each other because they can haul the same or similar products from different origins to the same destinations, or vice versa. And even where they do not currently compete, they may offer the promise of future competition.

Take an obvious example. BNSF and CN claimed that their proposed merger was “end to end”. Yet CN controlled lines that could be used to compete

with BNSF and UP for the transportation of Powder River Basin coal, in conjunction with DM&E or some other carrier. A BNSF-CN merger would have made that competition much more difficult – and a responsive merger by UP might have killed any hope of creating more effective competition for this important traffic. See IMPACT Reply Comments at 17.

Reducing the number of large railroads inevitably reduces actual and potential competition, sometimes in ways that are difficult to anticipate or prove in advance. Therefore, a remedy that can effectively increase the number of railroads serving major markets – divestiture – ought to be considered in evaluating every Class I merger. If there are lines that, to the merged carrier, are “redundant”, as UP says, why should the merged carrier object if a another railroad is able to purchase those lines? Perhaps UP’s answer is that the merged carrier objects because it wants to “combine traffic flows”, and it doesn’t want any interference in that effort from a competing railroad.

But the public likes competition, even if the big railroads do not. And the Board should adopt policies that promote competition effectively, such as divestiture.


### **CONCLUSION**

It is not too late to make one last effort to restore adequate intramodal competition among Class I railroads – but it will be too late if the Board’s merger moratorium expires in a few months without effective, procompetitive merger rules in place. IMPACT and others have suggested important improvements to the



Board's Proposed Rules that to advance this vitally important goal. IMPACT urges the Board to embrace these proposals.

Respectfully submitted,



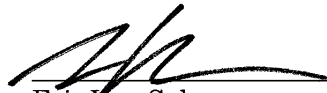
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Attorneys for the Committee To Improve  
American Coal Transportation

January 11, 2001

### **CERTIFICATE OF SERVICE**

I hereby certify that on January 11, 2001 I caused to be served, by first-class mail prepaid, a true and correct copy of the foregoing Rebuttal Comments of the Committee To Improve American Coal Transportation on all Parties of Record in STB Ex Parte No. 582 (Sub-No. 1).

  
Eric Von Salzen

Dated: January 11, 2001